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In the Supreme Court of the United States

October Term, 1959

STANDARD MOTOR PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WILLIAM A. ROSS,
Acting Assistant Attorney General,
MILTON A. SMITH,
PHILIP C. JOHNSON,
Attorneys,
Department of Justice, Washington 25, D.C.

P. B. MORRISSETT,
Acting General Counsel,
ALAN B. MORRISON,
Assistant General Counsel,
Federal Trade Commission, Washington 25, D.C.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 25–29) is reported at 265 F. 2d 674. The opinion and order of the Federal Trade Commission (R. 70–87) is not yet reported.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1959 (Pet. 30–31). The petition for certiorari was filed on July 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." designates the appendix filed by petitioner in the court below and filed in this Court pursuant to Rule 21 (3) and (4).

QUESTIONS PRESENTED

The Commission found that a rebate system utilized by petitioner, under which its jobber customers paid varying prices for its goods depending on their annual volume of purchases, and certain jobbers, members of group purchasing organizations, secured a higher percentage rebate based on the total volume of purchases of their group, violated Section 2(a) of the Robinson-Patman Act. The questions presented are:

1. Was the conclusion that petitioner's pricing practices adversely affect competition among the jobbers valid, although the price the jobbers paid did not affect the price at which they resold petitioner's goods and some of those who paid higher prices increased their business more than their favored competitors.

2. Was petitioner's "meeting competition" defense to the group purchase discounts properly rejected because its plan was not merely defensive in character and was part of a general method of doing business rather than an individual response to a particular competitive challenge.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in pertinent part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such

discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

Petitioner, a New York corporation, manufactures and distributes for resale throughout the United States replacement parts for automotive ignition systems. On December 20, 1949, a Commission complaint challenged petitioner's practice of discriminating in price terms offered to competing jobber distributors (R. 1–5).

There is no dispute or conflict in the evidence as to petitioner's pricing system. A basic price for each part is published in petitioner's Distributor's Price List, but the net price paid by any distributor varies with the dollar volume of his total annual purchases of petitioner's products. The net price to a distributor is determined from petitioner's rebate schedules, which provide for varying retroactive annual volume rebates ranging from 3% on purchases of $1,800 to 20% on purchases over $100,000 (R. 60). Petitioner's customers throughout the United States thus receive rebates which vary in relation to the volume of annual purchases by each customer; regardless of what it costs Standard to do business with them, retailers buying in identical quantities on the same day may pay substantially differing prices for the merchandise. Petitioner made no attempt to justify lower prices to volume purchasers by reason of any cost savings.

Petitioner permits some purchasers even greater rebates than those to which they would be entitled by consequence of their individual orders. These purchasers are jobbers who have joined together in group-buying organizations to which petitioner grants rebates based on the group's aggregate volume. In-

dividual members of these groups buy directly from petitioner, and merchandise so ordered is shipped by petitioner directly to the individual jobber or his customer. Petitioner maintains individual sales records for each jobber, whether or not he is a member of a group, and petitioner's salesmen call separately on group and non-group purchasers alike to write up orders, work with purchasers' salesmen, check inventory and so forth. Billing of group customers, however, is made to the group office. Standard's monthly statements are paid by the group office for the aggregate purchase orders of all its members, with each jobber member in turn settling with the group office for his own purchases. The annual volume rebate based upon the aggregate purchases is paid to the group office, which redistributes the net volume rebate to jobber members. As a consequence, group members normally secure rebates at a rate considerably higher than they would obtain if the rebate were computed on the volume of their individual purchases.

After hearing, the Commission Examiner found that Standard had systematically discriminated in the prices charged jobbers for purchase of identical goods, both through the volume rebates accorded individual jobbers and through the greater rebates afforded jobbers dealing through the group-buying organizations (R. 61, 67). Concluding that such discrimination was injurious to competition among the jobbers (*ibid.*), that it was an illegal device utilized as an offensive weapon to gain new customers, and that it could not be justified under Section 2(b) as a good-faith effort to meet equally low prices offered by a competitor

(R. 65–67), he proposed that petitioner be ordered to cease and desist from further price discrimination among its customers (R. 68–69).

The Commission unanimously agreed with its Examiner (R. 70–87), rejecting petitioner's contention that no adverse effect upon competition had been shown (R. 76–77) and overruling its "meeting-competition" defense under Section 2(b) (R. 77–84). The Court of Appeals, finding this to be a case involving "decided anticompetitive [practices]" (Pet. 29), affirmed (*id.*, at 25–29).

ARGUMENT

This case, one of a series of recent decisions enforcing orders of the Federal Trade Commission requiring automobile part manufacturers to desist from anticompetitive price discrimination through rebates to volume purchasers,[2] presents no novel or substantial question calling for resolution by this Court.

Petitioner's primary contention, though phrased in terms of an asserted rule of law, is merely a renewed attack upon the Commission's finding that petitioner's pricing activities "have an unlawful effect upon com-

[2] *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (C.A. 7), reversed on other grounds *sub nom.*, *Federal Trade Commission* v. *C. E. Niehoff & Co.*, 355 U.S. 411; *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (C.A. 8), affirmed, 355 U.S. 411; *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (C.A. 7), certiorari denied, 355 U.S. 941; *P. & D. Mfg. Co.* v. *Federal Trade Commission*, 245 F. 2d 281 (C.A. 7), certiorari denied, 355 U.S. 884; *P. Sorensen Mfg. Co.* v. *Federal Trade Commission*, 246 F. 2d 687 (C.A.D.C.); *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (C.A. 7).

petition in distributors' resale of [petitioner's] products." (Pet. 27–28. Compare Pet. 2 with Pet. 7.) Contrary to petitioner's assertion, neither the court below (see Pet. 27–29), the Commission (R. 76–77), nor the examiner (R. 61–65, 67–68) suggested that a *prima facie* case of price discrimination under Section 2(a) of the Robinson-Patman Act could not be rebutted. Each held only that the clear and undisputed evidence of discrimination between dealers, resulting from petitioner's rebate practices, had not been shown to be without serious effect upon competition by the evidence that the varying rebate percentages allowed the distributors did not result in differing retail prices; that some dealers discriminated against had nonetheless increased their overall business more rapidly than their favored competitors; and that a number of dealers believed that they had not suffered any competitive injury as a result of the higher prices they had been required to pay for petitioner's goods.

The Commission pointed out that, though some favored dealers might not take advantage of their opportunities, and all generally resold at prices recommended by petitioner, such evidence did not rebut the *prima facie* showing of the competitive effect of the admitted price discrimination upon numerous small dealers operating on narrow profit margins (R. 76–77). And the court below concluded that the growth of purchasing groups organized to take advantage of the rebate system adopted by petitioner and its competitors showed "an industry-wide pricing system with decided anti-competitive tendencies" (Pet. 29), in contrast to the

minimum *prima facie* case held sufficient in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37.

2. Petitioner's second contention, that the Court of Appeals erred as a matter of law in rejecting the Section 2(b) defense (that its pricing system was adopted "in good faith to meet an equally low price of a competitor"), is equally unpersuasive as demonstrating the need for further review. As the Court of Appeals observed (Pet. 29): "[T]his defense is made only as to its sales to joint purchasing groups, [so that] the Commission's order must stand in any event, since the standard [*i.e.*, individual] distributor contracts have themselves been shown to result in discriminations in price which may lessen competition." Moreover, as to the group discriminations, the reviewing court (*ibid.*) found substantial evidence supporting the Commission's findings that the challenged plan was a "general system of competition", rather than one "adapted to meet the individual competitive situation"; and that "the operation of the system was not limited to retaining customers * * * it in fact secured new customers * * *" (R. 83). See *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 249-250. As this Court restated only recently, "substantiality of evidence on the record as a whole is a question which Congress has placed in the keeping of the Courts of Appeals." *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

RICHARD A. SOLOMON,
JOHN C. DANIELSON,
Attorneys.

P. B. MOREHOUSE,
Acting General Counsel,

ALAN B. HOBBES,
Assistant General Counsel,
Federal Trade Commission.

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